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Supreme Court, U.S.
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No. 94-622

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOUGLAS GREENE,

Petitioner,

vs.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE,

Respondents.

PETITION FOR CERTIORARI FROM
THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
ATTORNEY GENERAL
TREVA G. ASHWORTH*
DEPUTY ATTORNEY GENERAL
S.C. ATTORNEY GENERAL'S OFFICE
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
(803) 734-3680

ATTORNEYS FOR SOUTH CAROLINA ELECTION COMMISSION AND SOUTH CAROLINA BOARD OF STATE CANVASSERS
*COUNSEL OF RECORD

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24 pp

QUESTION PRESENTED

Did the South Carolina Supreme Court properly affirm the decision of the State Board of Canvassers denying Petitioner's protest of a county council election?

PARTIES

Petitioner

Douglas Greene

Respondents

South Carolina Election Commission
South Carolina Board of State Canvassers
Aiken County Election Commission
Aiken County Board of Canvassers
Lawana R. McKenzie

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OPINION BELOW

The Petitioner seeks to appeal a decision of the South Carolina Supreme Court, Greene v. South Carolina Election Commission, 445 S.E.2d 451 (1994). This case is reprinted in Appendix C of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

On June 20, 1994, the South Carolina Supreme Court issued its Order in this case. A Petition for Rehearing was filed on July 1, 1994, and denied on July 13, 1994. On October 7 a Petition for Certiorari was filed in this Court. Jurisdiction has been sought under 28 U.S.C. §1257.

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STATEMENT OF THE CASE

The Petitioner protested an April 27, 1993, special election for a County Council District seat in Aiken, South Carolina. The Petitioner lost by a vote of 623 to his challenger's 628 votes.

Petitioner protested the election and a hearing was held before the Aiken County Board of Canvassers. The County Board denied the protest. The Petitioner appealed this decision to the State Board of Canvassers and a hearing was subsequently held on his appeal. The State Board also denied the protest. The Petitioner then petitioned the South Carolina Supreme Court for a Writ of Certiorari. The South Carolina Supreme Court affirmed the State Board and denied the relief requested by the Petitioner. The Petitioner has now petitioned for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

Ten affidavits were introduced at the protest hearing before the County Board of Canvassers of eleven people who stated they thought they were residents of District 3 but did not receive a District 3 ballot. These voters did not receive a District 3 ballot because the registration list, which

is presumed to be valid, stated that they were registered in a district other than District 3.

The South Carolina Supreme Court upheld the election based on state statutory requirements governing the challenging of a ballot.

ARGUMENT

I.

BACKGROUND

The Petitioner seeks a Writ of Certiorari to request this Court to review a decision of the South Carolina Supreme Court regarding an election protest. The Petitioner was an unsuccessful candidate in a special election for a county council seat in Aiken, South Carolina. He protested his loss of the election to the County Board of Canvassers, the State Board of Canvassers and the South Carolina Supreme Court. [1]

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[1] In South Carolina a protest of a county office is first heard by the county board of canvassers, S.C. Code Ann. §7-17-30

Both of the Boards and the South Carolina Supreme Court were unanimous in upholding the election.

After the election for a county council seat eleven people signed affidavits stating that they were not allowed to vote in the District 3 county council race because the registration list reflected they did not live in District 3. The registration officials gave these individuals ballots for the district in which the registration list indicated they were registered. These eleven voters then all voted the ballot that the registration list indicated was the ballot to which they were entitled. The affidavits do not reflect that these voters requested to vote a challenged ballot.

Under South Carolina law, a poll watch-

(Supp 1993) a decision of the county board may be appealed to the State Board of Canvassers, S.C. Code Ann. §7-17-60 (1976), an petition for certiorari may be taken to the South Carolina Supreme Court from any decision of the State Board, S.C. Code Ann. §7-17-250 (1976).

er may challenge a person's vote necessitating, if the statutory requirements are met, that the vote be voted by way of a challenged ballot. [2] The Petitioner had a poll watcher at the polling place; however, the poll watcher did not request these persons vote a challenged ballot.

The Petitioner has consistently argued that the voters should have voted a challenged ballot and that it was incumbent for the poll managers to give the voters a challenged ballot when the voters believed they lived in a district different from the one in which the registration list indicated they resided. Three hearings have affirmed that under South Carolina law more is required before a challenged ballot should be required to be voted.

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[2] In South Carolina voting a challenged ballot would require a person to vote a ballot that would be placed in an envelope and retained for a hearing on whether the person had the proper qualifications to vote. S.C. Code Ann. § 7-13-830 (Supp 1993).

Every prospective voter in South Carolina must first register to vote. S.C. Code Ann. §§7-5-120, 7-5-155, 7-5-170 (Supp 1993). The registration form requires the person registering to vote to provide information regarding where he actually resides.

A person once registered is listed on the official registration lists of the county. S.C. Code Ann. §7-5-410 (1976); 29 C.J.S., Elections, §47. Prior to the election the State Election Commission generates a registration list of all the persons registered to vote in each precinct. S.C. Code Ann. §§7-5-420; 7-5-430 (1976). The list is presumed to be conclusive evidence as to who is registered and entitled to vote in each precinct. As is stated in 29 C.J.S., Elections, §49

> [p]ersons who are properly registered are entitled to vote in such elections and over such a period of time as the constitution and statutes permit. A registration list is conclusive evidence as to the fact of registration of those persons whose names appear there-

on. It is at least prima facie evidence of who constitutes the qualified voters.

II.

THE AFFIANTS PROPERLY VOTED UNDER SOUTH CAROLINA LAW.

The present election concerns a County Council election for District 3 in Aiken, South Carolina. The district line for District 3 splits at least one precinct. This split district line has divided this district since 1983 and it was not changed or altered prior to this contested election.

In split precincts voters are often unsure or confused as to the exact district in which they are entitled to vote. Poll managers are not required every time a voter believes he lives in a district other than the one listed on the registration list to offer the person a challenged ballot to vote. The poll managers may properly presume the registration list is valid and follow it.

A challenge to a voter in South Carolina has a specific statutory meaning and occurs only in certain specified situations as set out by statute. Two South Carolina statutes primarily govern challenged ballots, S.C. Code Ann. §§7-13-810 and 7-13-830 (Supp 1993). S.C. Code Ann. §7-13-810 (Supp 1993) provides in pertinent part that

> [t]he managers of election shall prevent any person from voting when they have good reason to believe the person has already voted. They shall refuse to allow any person to vote who is not a registered elector or who has become disqualified for any cause to vote in such voting precinct. ... Any elector or qualified watcher may, and it is the duty of the managers of the election to, challenge the vote of any person who may be known or suspected not to be a qualified voters. ... The manager shall then present the challenge to the voter and act in accordance with the provisions provided for in this section.

S.C. Code Ann. §7-13-830 (Supp 1993) sets out the procedure to be followed when a voter is challenged.

> When any person is so challenged, the manager shall explain to him

> the qualifications of an elector and may examine his as to the same. If the person insists that he is qualified and the challenge is not withdrawn, his vote must be received and placed in an envelope on which must be written the name of the voter and that of the challenger.

There are therefore, three statutory grounds to challenge a voter; i.e., that the voter has previously voted in the election, that he is not a registered elector, or, that he has become disqualified.

The eleven voters who signed affidavits in this case were informed that according to the registration list they resided in a district other than District 3. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 9. These eleven voters to a person all then voted the ballot that the registration list indicated was the ballot to which they were entitled. " None of the affidavits ... claim that any of these voters requested a challenge ballot and were refused." Order, S.C. Supreme

Court, Appendix C of Petition for Writ of Certiorari, p. 11. The poll watchers for the Libertarian Party who observed these events did not challenge the voter not being issued a District 3 ballot and insist that the voters be allowed to vote a challenged ballot. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 13. The voters, themselves, did not insist upon a District 3 ballot. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 14. The poll manager did not challenge and would not have challenged the voter being given a ballot for District 3 because the ballot the voter received was consistent with the information reflected on the registration list. In the poll manager's view the voter was being given the proper ballot as was reflected on the registration list. As the South Carolina Supreme Court stated

> [r]equiring the voter to insist on a challenge ballot at the poll

preserves the record and prevents after-the-fact challenges to otherwise proper elections. The purpose of S.C. Code Ann. §7-13-710, et. seq. is to assure the orderly and fair election of our public officials. Adopting Mr. Greene's interpretation of the Act would frustrate rather than further the legislative goal. Under the interpretation of the Act urged by Mr. Greene, affidavits of voters who did not bother to vote but were unhappy with the results could be collected for an after-the-fact challenge. In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required that the voter 'insist' upon casting a challenge ballot. S.C. Code Ann. §7-13-830 (Supp. 1993). ... a vote may be challenged by a watcher, elector, or manager. Thus, it was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote in the District 3 election. As in Hill v. South Carolina Election Commission, 304 S.C. 15, 403 S.E.2d 309 (1991), the errors in placing voters in districts to which they did not belong were errors which could have been discovered prior to the election. Affidavits of voters who did not insist in voting in the District 3 election simply did not rise to the level of a 'challenge' which required the issuance of a challenge ballot under the statute. See, Berry v. Spigner, 266 S.C.

> 183, 84 S.E.2d 831 (1954) (affidavit of voter that poll manager cast voter's vote did not constitute challenge).

Appendix C of Petition for Writ of Certiorari, pp. 13-14.

III.

THE CASE WAS DECIDED UNDER SOUTH CAROLINA LAW GOVERNING ELECTIONS.

The South Carolina Supreme Court resolved this case purely under State law. The Court did not discuss or decide a federal question nor did it even cite a federal statute. Only the Petitioner has raised the provisions of the Voting Rights Act as grounds for his continuing protest of this election.

The standard of review for a decision of the State Board to be overturned on appeal was set out in the South Carolina Supreme Court Order below as

> [t]he scope of appellate review of the State Board's order 'is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence.' Knight v. State Board of Canvassers, 297

> S.C. 55, 57, 374 S.E.2d 685 (1988); Simms v. Hamm, 275 S.C. 369, 271 S.E.2d 316 (1980); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954). Every reasonable presumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it.

Appendix C of Petition for Writ of Certiorari, p. 10.

In a protest of an election, in order to overturn the election in South Carolina, the State Board must be presented with evidence that an error or irregularity occurred, Hyde v.Boykin, 101 S.E.2d 41 (1919); Berry, supra, Fielding v. South Carolina Election Commission, 408 S.E.2d 232 (1991), and, that the error affected the result; Berry, supra. The State Board found that this burden had not been met. The South Carolina Supreme Court agreed. [3]

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[3] The South Carolina Supreme Court did not discuss the standard of review under the United States Constitution as this case was decided under State law.

The Petitioner alleges that the election officials violated various provisions of the South Carolina Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Voting Rights Act. (Petition, pp. 23-26)

The election was regularly conducted under the laws of South Carolina, both statutory and constitutional. The poll managers did not apply a "test or device" nor did the poll managers deny a voter the right to vote.

The Voting Rights Act provides that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

42 U.S.C. §1973 (a).

Section 1973b (a) (1) assures

> ... that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State ....

A "test or device" is defined at 42 U.S.C. §1973b (c) as

> ... any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

The Voting Rights Act by its very provisions is not applicable to the factual situation presented by this case in that the voters were not subjected to a test or device as defined in 42 U.S.C. §1973b (c).

CONCLUSION

The Respondent would respectfully request that the petition for Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

BY:

ATTORNEYS FOR SOUTH CAROLINA ELECTION COMMISSION AND SOUTH CAROLINA BOARD OF STATE CANVASSERS

Columbia, South Carolina

November 3, 1994.